U.S. Department of Labor

Office of Administrative Law Judges
525 Vine Street - Suite 900
Cincinnati, Ohio 45202

In the Matter of

U.S. DEPARTMENT OF LABOR Plaintiff versus ROGELIO CANO Defendant	:	Date Issued: OCT 23, 1987 Case Nos. 85-MSP-49 and 86-MSP-2
and		
U.S. DEPARTMENT OF LABOR Plaintiff versus JUAN CANO Defendant	:	Case No. 85-MSP-87

APPEARANCES:

Benjamin T. Chinni, Esq.
Office of the Solicitor
United States Department of Labor
Cleveland, Ohio
For the Plaintiff

Edna E. Canino, Esq.
Miami, Florida
For the Defendants

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Migrant and Seasonal Agricultural Worker's Protection Act of 1983, 29 U.S.C. §1801, et seq. (hereinafter referred to as the Act or MSPA) and its implementing regulations at 29 C.F.R. Part 500. This matter results from civil money penalty assessments issued by Carol J. Fluker, Special Assistant, Wage and Hour Division, U.S. Department of Labor, on July 5, 1984 against Rogelio Cano and Juan Cano and on March 27, 1985 against Rogelio Cano and from the Department of Labor's June 11, 1984 and March 19, 1985 revocations of Rogelio Cano's Farm Labor Contractor Certificate of Registration, which expired on September 30, 1985. On July 5, 1984, penalties in the amount of $8,600.00 were jointly assessed against Rogelio and Juan Cano and penalties in the amount of $1,000.00 were severally assessed against Rogelio Cano and Juan Cano. The total amount of the assessment, jointly and severally, was $10,600.00 and the assessment covered the period of time from September 10, 1982 until September 8, 1983. On March 27, 1985, penalties in the amount of $7,150.00 were assessed against Rogelio Cano. These penalties covered the period of time from August 22, 1984 until September 14, 1984.

Defendants timely filed requests for a formal hearing on each assessment and license revocation and the matters were referred to the Office of Administrative Law Judges for a final determination of the violations for which the penalties were imposed and the license revoked and of the appropriateness and reasonableness of each penalty. On September 8, 1986, it was ordered that the cases concerning Rogelio Cano be consolidated for hearing purposes and on October 23, 1986, it was ordered that the case concerning Juan Cano be consolidated for hearing purposes with the previously consolidated cases concerning Rogelio Cano. The cases concerning Rogelio Cano share the same defendant, employer-farmer, and compliance officer and the alleged violations in each case are of the same type, although they occurred in different years. The case concerning Juan Cano shares with the cases concerning Rogelio Cano the same employer-farmer and compliance officer and the alleged violations in each case are of the same type. In fact, the penalties assessed against Rogelio and Juan Cano in 1984 were issued jointly and severally and are predicated on identical facts.

A formal hearing was held on January 20 and 21, 1987 in Cincinnati, Ohio, where the parties had full opportunity to present evidence and legal arguments. Counsel for the parties submitted post-hearing briefs and Counsel for the Defendants also submitted a reply brief. The FINDINGS OF FACT AND CONCLUSIONS OF LAW which follow are based upon my observation of the appearance and the demeanor of the witnesses who testified it the hearing and upon a careful analysis of the entire record[1] in light of the arguments of the parties, applicable

[1]The record of this case was left open to receive additional documentary materials relating to the United States District Court action involving Juan Cano. (Tr. 316-320) Defendants' counsel timely submitted additional materials which are received into evidence as Defendant Post-Hearing Exhibit 1. (DPHX 1)

statutory provisions and regulations, and pertinent case law.

At the hearing, Michael P. Brady, Sara Shierling Cazel, and Carol J. Fluker testified on behalf of the Plaintiff. Although the record contains some inconsistencies with respect to each of their testimonies, I find the witnesses' separate testimonies to be credible. No witnesses testified on behalf of the Defendants.

ISSUES

The issues presented for resolution relevant to the period of time from September 10, 1982 until September 8, 1983 are as follows:

1. Whether Rogelio and Juan Cano failed to disclose the terms and conditions of employment, in writing, in a language they could understand, to workers at the time of recruitment, in violation of §201(a) of the Act;

2. Whether Rogelio and Juan Cano failed to make and/or keep all required payroll records, in violation of §201(d)(1) of the Act;

3. Whether Rogelio and Juan Cano failed to provide each worker with an itemized written statement of payroll information in violation of §201(d)(2) of the Act;

4. Whether Rogelio and Juan Cano knowingly utilized the services of aliens who were not lawfully admitted to the United States for permanent residence or authorized by the Attorney General to accept employment, in violation of §106(a) of the Act;

5. Whether Juan Cano failed to register as a farm labor contractor prior to engaging in farm labor contracting activities, in violation of §101(a) of the Act; and

6. Whether Rogelio Cano engaged the services of Juan Cano to perform farm labor contractor activities without first determining that he possessed a Certificate of Registration which was valid and authorized the activity for which he was utilized, in violation of §402 of the Act.

The issues presented for resolution relevant to the period of time from August 22, 1984 to September 14, 1984 are as follows:

1. Whether Rogelio Cano failed to disclose the terms and conditions of employment, in writing, in a language they could understand, to workers at the time of recruitment, in violation of §201(a) of the Act;

2. Whether Rogelio Cano failed to provide copies of all payroll records which he was required to keep to the employer-farmer to whom he furnished the workers, in violation of §201(e) of the Act;

3. Whether Rogelio Cano knowingly utilized the services of aliens who were not lawfully admitted to the United States for permanent residence or authorized by the Attorney General to accept employment, in violation of §106(a) of the Act; and

4. Whether Rogelio Cano's Certificate of Registration as a farm labor contractor, which expired on September 30, 1985, was properly revoked.

The Order of Reference concerning the period of time from September 10, 1982 until September 8, 1983, also contains Rogelio Cano's request for a formal hearing on the Department of Labor's June 11, 1984 decision to revoke his farm labor contractor's Certificate of Registration. At the hearing, counsel for the Plaintiff withdrew the letter of revocation addressed to Rogelio Cano dated June 11, 1984 and withdrew the issue of whether Rogelio Cano's Certificate of Registration was properly revoked on June 11, 1984. (Tr. 179-185)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Accurate findings of fact cannot be made in this case without my first making specific findings as to the reliability of the evidence submitted by the Plaintiff. Plaintiff's evidence consists of the testimony of the officer-in-charge of the U.S. Immigration and Naturalization Service's (hereinafter referred to as INS) Cincinnati Office, the testimony of the U.S. Department of Labor's investigating compliance officer in these cases, the testimony of the special assistant to the assistant regional administrator of the Wage and Hour Division, U.S. Department of Labor, and statements made by migrant workers to INS agents and to the investigating compliance officer and her assistants. The statements of the migrant workers are relied upon by Plaintiff to prove a majority of the allegations in these cases. Defendants have objected to these statements on the basis that they are hearsay, and therefore, inadmissible, and that they are inherently unreliable and should, therefore, be given little or no weight. The written statements of the migrant workers were received into evidence over the objections of Defendants' counsel at the formal hearing, thus, I address only the arguments of counsel regarding the weight which should be given to Plaintiff's evidence.

Counsel for the Defendants has attempted to establish that the employees of the Department of Labor and INS who recorded and translated the statements made by the migrant workers are not trustworthy and that they may have failed to accurately perform their duties when they interviewed the migrant workers. I find no reason to conclude that the Department of Labor and INS employees who have regular contact with illegal aliens, some of whom are Spanish-speaking, are not adequately trained to perform their duties. I also find no reason to conclude that these employees are motivated to falsify reports which they are required to complete in the scope of their employment.

Those persons are investigators for agencies of the United States Government and the record contains no evidence to indicate that they do *anything but* thoroughly and honestly investigate those cases assigned to them. Therefore, I find that the writings themselves are accurate and reliable to the extent that they report what transpired between the migrant workers and the investigators. I next turn to the issue of whether the statements made by the migrant workers are reliable.

Strict application of the federal rules of evidence is not required in administrative proceedings and decision-making. Hearsay evidence should not be rejected merely because of its hearsay nature and may constitute substantial evidence if it is probative and bears an indicia of reliability. Calhoun v. Bailar, 626 F.2d 145, 148-149 (9th Cir. 1980). Factors to be considered in determining whether the written statements are reliable include the independence or possible bias of the declarant; whether the statements are signed and sworn to as opposed to anonymous oral or unsworn; whether the declarant is available to testify; whether other evidence is available; whether the statements are corroborated; whether the statements were based upon personal knowledge; and whether there are inconsistencies between the statements. Richardson v. Perales, 402 U.S. 389, 402-406 (1971); Calhoun, supra.

Although the migrant workers' testimony subject to cross-examination would have been superior to their written statements, the record indicates that the illegal alien migrant workers whose statements appear in the record returned to Mexico. (Tr. 25, 84-85, 87; PX 1-2) If they did remain in or return to the United States, it is clear that they are unavailable because the parties have no knowledge of their whereabouts. Those migrant workers who were lawfully working in the United States are also apparently unavailable. The statements are signed and in writing and the majority were witnessed. It appears that the only other probative and relevant evidence would have been Defendants' statements and neither Rogelio nor Juan Cano testified.

The statements of the illegal alien migrant workers are declarations against their interests. Although counsel for the Defendants has argued that the illegal alien migrant workers were motivated to be untruthful because they had been detained and/or arrested, counsel has done no more than put forth that assertion. Any advantage the migrant workers might have believed being untruthful would have gained for them has not been established. In fact, Ms. Cazel, the investigating compliance officer for the U.S. Department of Labor, testified that the migrant workers have no idea what the answers to the questions asked "should be" or what the investigators are "looking for." (Tr. 227) Ms. Cazel also testified that the Department of Labor's investigators have no effect on deportation decisions. (Tr. 227) Mr. Brady, the Officer-in-Charge of the INS Office in Cincinnati, testified that INS attempts to assist illegal alien migrant workers in obtaining any wages which they are owed. (Tr. 32)

If any migrant workers were motivated to falsify their statements, it is equally as likely that the migrant workers who were legally working in the United States were so motivated. It would be to their advantage to assist their employer. However, in light of the fact that the Department of Labor's investigators did not indicate to the migrant workers the purpose of their questions, I find no reason to question the reliability of the statements of the migrant workers who were legally

working in the United States.

The factor which I find to be of utmost importance in this case is whether the migrant workers' statements were based upon personal knowledge. The migrant workers obviously possessed personal knowledge of the circumstances surrounding their hiring, their employment conditions, and the method through which they were paid for their work. They also had personal knowledge of whether they were asked certain questions by Juan or Rogelio Cano and of their own answers to those questions. They did not, however, have personal knowledge of what either Juan or Rogelio Cano "knew."

I find that the statements of the migrant workers are reliable regarding matters for which each migrant worker had personal knowledge, but that they are not reliable regarding matters for which they did not have personal knowledge.

> Counsel for the Defendants also objected to much of the evidence in the record because it is not the best evidence and, therefore, is not competent evidence. The relevant portion of 29 C.F.R. §18.44(b), however, states that "[material and relevant evidence shall not be excluded because it is not the best evidence, unless its authenticity has been challenged." Counsel for the Defendants has not challenged the authenticity of any of the evidence in this record, therefore, it is properly considered herein. This record supports a finding of the following scenario of events:
>
> 1. On September 26, 1983, Rogelio Cano's (also referred to as Roy Cano) application to renew the Farm Labor Contractor Certificate of Registration which had previously been issued to him was approved through a procedure mandated by the U.S. Department of Labor. Mr. Cano was certified to recruit, solicit, hire, employ, pay, and transport migrant workers, but was not authorized to house migrant workers. (PX 5)
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> 2. During the 1983 and 1984 growing seasons, specifically August and September of those years, Rogelio Cano was the farm labor contractor, or crew leader, present on the farm owned by Paul Knick, which is also referred to as the Knick Farm. The Knick Farm is located in Ansonia, Ohio. (Tr. 98-101, 129-131)
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> 3. During the 1983 and 1984 growing seasons, migrant laborers picked tomatoes on the Knick Farm under Rogelio Cano's supervision. (Tr. 98-101, 129-131, 232; PX 1-4)
>
> 4. On August 24, 1983, a Department of Labor investigation was conducted at the Knick Farm. (Tr. 98-99) The investigating compliance officer in charge of the investigation was Sara Shierling Cazel and the assisting compliance officer was Margaret Schott. (Tr. 98-99)

5. During their August 24, 1983 investigation, the compliance officers interviewed either Mr. or Mrs. Paul Knick, Rogelio Cano, and migrant workers Filomeno Martinez, Manuela Molina, Nabal Guzman Solis, and Juan Zuniga and reviewed any available payroll records. (Tr. 98-104; PX 3)

6. On September 7, 1983, INS apprehended six illegal aliens who were working as migrant laborers and who stated that they were employed by Juan Cano in Ansonia, Ohio. The six illegal aliens were Alfonso Barron-Colchaio, Basilio Borjas-Barron, Melecio Maldonado Duque, Jaime Zuniga Maldona, Juan Zuniga Vega, and Guillermo Sanella-Ortega. (Tr. 34-35; PX 1)

7. The illegal aliens apprehended on September 7, 1983 returned to Mexico. (Tr. 25)

8. On September 7 and 8, 1983, the Department of Labor's investigating compliance officer and an assistant, Bobby bobbins, interviewed migrant workers Leonardo Zuniga Alanis, Alfonso Barron, Basilio Borjas, Melecio Maldonado Duque, Jaime Zuniga Maldona. Jose Orlando Reyes, Juan Zuniga Vega, Guillermo Zanella, and Saul Martinez Zuniga.(Tr. 106, 108-109; PX 3)

9. Some of the migrant workers interviewed by the Department of Labor on September 7 and 8, 1983, had been apprehended by INS and were jailed at the time of the interviews while others were in the field or the housing camp. (Tr. 108)

10. Juan Cano was not a registered farm labor contractor or farm labor contractor employee in 1983. (Tr. 119-120)

11. Juan Cano was listed on Rogelio Cano's 1983 payroll as an employee. (Tr. 119)

12. One of the illegal alien migrant workers apprehended by INS on September 7, 1983 was listed on Rogelio Cano's 1983 payroll records. Only one of Rogelio Cano's 1983 payroll records was reviewed by the Department of Labor's investigating compliance officer. (Tr. 123)

13. At a closing conference with Ms. Cazel on August 25, 1983, Rogelio Cano agreed to comply with the Act. (Tr. 124-125)

14. On August 23, 1984, a Department of Labor investigation was conducted at the Knick Farm. The investigating compliance officer was Sara Shierling Cazel and she was assisted by Margaret Schott. (Tr. 129-130)

15. During the August 23, 1984 investigation, the compliance officers interviewed either Mr. or Mrs. Paul Knick, Rogelio Cano, and migrant workers Yolanda Cortinas, Josie Domingoez, Manuel Sarale, Domingo Garcia Peses, Esperanza Perez, Saul Torres, and Blanca Torres. (Tr. 130-131; PX 4)

16. On August 23, 1984, the investigating compliance officers requested from either Mr. or Mrs. Knick copies of the payroll records from the 1983 growing season. The Knicks did not have those records. The compliance officers then asked Rogelio Cano for those records, but he told them to speak with his sister, Gloria, who was one of Mr. Cano's employees. Gloria indicated that she did not have the payroll records from the 1983 growing season and that they had not been submitted to the Knicks. (Tr. 142-143)

17. On September 13, 1984, INS apprehended seven illegal aliens who were working as migrant laborers. The illegal aliens named as their employer either Knick Farms or Juan Cano. The illegal aliens apprehended on that date were Everado Guzman-Alcanta, Ricardo Barrios-Lopez, Gabriela Godinez-De Barrios, Javier Flores-Nino, Sexto Goerrero-Castillo, Alfredo Vasquez-Pintor, and Efran Ventura-Silva. A child who was less than one year old was also apprehended. (PX 2)

18. The illegal alien migrant workers apprehended on September 13, 1984 returned to Mexico. (Tr. 25; PX 2)

19. On September 13, 1984, the Department of Labor was notified by INS that illegal aliens had been apprehended. Consequently, on the same date, Ms. Cazel, Jesus Martinez, who is also a compliance officer, and Bobby Dobbins, who is an assistant area director, interviewed Sr. Everado Guzman Alcanta, Ricardo Barrios, Marta Godinez, and Carlos Javier Flores-Nino. The interviews took place in jail, in the fields, or in the housing camp. (Tr. 133-135; PX 4)

20. On October 3. 1984. Ms. Cazel and Ms. Schott interviewed Sixto Guerrero Castillo, Alfredo Vazquez Pinto, and Efrain Ventura. They were in a Boone County, Kentucky jail at the time they were interviewed. (Tr. 135-137; PX 4)

21. Ms. Cazel held an opening conference with Rogelio Cano in 1984. She testified that when asked if he had complied with the written disclosure requirement of the Act, Mr. Cano said that he had posted the employment conditions in the housing camp and on one of the vehicles. (Tr. 139-140)

22. On September 13 or 14, 1984, Ms. Cazel held a closing conference with

Rogelio Cano during which he agreed to comply with the Act in the future. (Tr. 146-147)

Written Disclosure of Conditions of Employment

Section 201(a) of the Act, 29 U.S.C. §1831, and §500.75(b) of the Regulations require farm labor contractors to ascertain to the best of their abilities and to disclose, in writing to the extent they have obtained such information, to migrant workers at the time of recruitment the following information: 1) the place of employment; 2) the wage rates to be paid; 3) the crops and kinds of activities on which the employee may be employed; 4) the period of employment; 5) the transportation, housing and any other employee benefits to be provided, if any, and any costs to be charged for each of them; 6) workers' compensation and unemployment insurance; 7) the existence of any strike or other concerted work stoppage, slowdown or interruption of operations by employees at the place of employment; and 8) the existence of any arrangements with any owner or agent of any establishment in the area of employment under which the farm labor contractor is to receive a commission or any other benefit resulting from any sales by such establishment to the workers. The disclosure requirement is separate and distinct from the requirement that the farm labor contractor post in a conspicuous place a poster setting forth rights and protections provided to workers under the Act. Sections.500.75(b) and (c); see also Wheeler v. King, 92 CCH Lab. Cas. ¶(34,102 (S.D.N.Y. 1981). Oral disclosure also does not satisfy the requirement of written disclosure. See id.

Growing Year 1983 - Rogelio and Juan Cano

The record contains the statements of twelve migrant workers, one of whom was interviewed on two separate occasions, who were interviewed by Department of Labor investigators during the 1983 growing year. (PX 3) Seven of those twelve migrant workers stated that they did not see a written description of the conditions of their employment, one stated that he was shown by Roy Cano "in writing" the wages he would receive and four did not indicate whether they were shown a written statement of the employment conditions. Eight of the twelve migrant workers stated that they were hired by Juan Cano, two stated that they were hired by Roy Cano, one stated that he was hired by Mr. Knick, and the worker who was interviewed twice indicated that he had contact with both Roy and Juan Cano. The migrant worker hired by Mr. Knick did not comment on whether he had been shown a written statement of the employment conditions.

The Department of Labor's investigating compliance officer testified that the migrant workers who were interviewed were asked whether they were shown a written statement of the employment conditions. (Tr. 112-113, 205-209) She also testified that she asked Rogelio Cano whether the migrant workers had been shown written statements of their employment conditions, but that she could not remember what he told her. (Tr. 113-114)

Farm labor contractors are responsible for any violations under the Act committed by their employees, whether or not the employees obtain a Certificate of Registration issued by the

Department of Labor or an authorized state agency. §§500.1(c) and 500.60. Ms. Cazel testified that on the 1983 payroll records she reviewed at the time of the 1983 investigation, Juan Cano was listed as an employee of Rogelio Cano. (Tr. 117-119) Juan Cano is Rogelio Cano's father. (Tr. 119) I find that the record establishes that Juan Cano was Rogelio Cano's employee and that Rogelio Cano was the farm labor contractor on the Knick Farm during the 1983 growing year. Accordingly, Rogelio Cano, as the employer, is responsible for any violations under the Act committed by Juan Cano, his employee. After careful consideration, I find that the reliable and relevant evidence contained in the record is sufficient to establish that during the 1983 growing season. Rogelio and Juan Cano violated the Act by failing to show to migrant workers a written statement of their employment conditions.

The Department of Labor assessed a penalty of $100.00 against Rogelio and Juan Cano jointly on the basis of the failure to disclose violation. One-hundred dollars is recommended by the Department of Labor as the appropriate penalty for a failure to disclose violation. (PX 6) The Department of Labor's penalty recommendation includes the provision that if a violation is other than aggravated, willful, or recurring, the penalty should be reduced by fifty percent. (PX 6) As the record establishes that the disclosure violation was recurring, i.e., repeated during the 1983 growing year, I find that the penalty assessed by the Department of Labor is reasonable and appropriate.

Growing Year 1984 - Rogelio Cano

The record contains the statements of eleven migrant workers who were interviewed by the Department of Labor investigators during the 1984 growing year. (PX 4) Ten of those workers stated that they were hired by Roy or Rogelio Cano and one stated that he was hired by Juan Cano. Five of the eleven workers interviewed stated that they were not shown a written statement of their employment conditions and six did not comment on whether they were shown a written statement of their employment conditions. The worker hired by Juan Cano was one of the workers who did not comment on this issue. Two of the workers who did not indicate whether they had been shown a statement of their employment conditions stated that they were told about their employment conditions and that the conditions are posted in the camp. One of the workers who did not comment on the issue stated that he was told about the conditions and another worker who did not comment on the issue stated that the employment conditions were posted. One worker who indicated that he did not see a written statement of the employment conditions stated that he was told what the conditions would be. Ms. Cazel testified that when she spoke with Rogelio Cano in 1984 about the disclosure requirement, he told her that the employment conditions had been posted. (Tr. 139-141)

Oral disclosure and posting do not fulfill the requirements of §201 (a) of the Act and §500.75(b) of the Regulations. After careful consideration, I find that it has been established that Rogelio Cano did violate the written disclosure requirement of the Act.

The Department of Labor assessed a penalty of $100.00 against Rogelio Cano on the basis of the failure to disclose violation. One-hundred dollars is recommended by the Department of

Labor as the appropriate penalty for a failure to disclose violation. (PX 6) As the record establishes that the violation was recurring, i.e., repeated during the 1984 growing year, I find that the penalty assessed by the Department of Labor is reasonable and appropriate.

Make and Keep Payroll Records

Section 201(d)(1) of the Act, 29 U.S.C. §1831, and §500.80(a) - (b) of the Regulations provide that a farm labor contractor shall, with respect to each worker, make, keep, and preserve for three years the following information: 1) the basis on which wages are paid; 2) the number of piecework units earned, if paid on a piecework basis; 3) the number of hours worked; 4) the total pay period earnings; 5) the specific sums withheld and the purpose of each sum withheld; and 6) the net pay. It is alleged that the violation of this provision occurred only during the 1983 growing year.

Ms. Cazel testified that she reviewed the payroll records available at the time the 1983 investigation was conducted. (Tr. 116-117) She stated that she believes there had been only one completed payroll at the time she reviewed the 1983 payroll records. (Tr. 123) She testified that the records showed that one of Rogelio Cano's employees hours worked were not recorded and that only a daily rate was recorded for that employee. (Tr. 116) The employee whose hours were not recorded was identified as Rogelio Cano's sister. (Tr. 270-271) Additionally, she stated that three of the migrant workers who were determined to be illegal aliens by INS and who stated that they were working "at that time" did not appear on the payroll records. (Tr. 123, 266-267) One migrant worker who was determined to be an illegal alien by INS was listed on the payroll records. (Tr. 123) Ms. Cazel did not name the migrant workers who claimed to be working during the period covered by the payroll records and who were not listed on the payroll records.

Three of the six migrant workers who were determined to be illegal aliens indicated to the INS investigators that they had been working since August 7, 1983, two indicated that they had been working since August 1983, and one indicated that he had been working since August 24, 1983. (PX 1) The statements these migrant workers gave to the Department of Labor investigators are generally consistent with the statements they gave to the INS investigators. (PX 3)

Nothing in this record demonstrates that Rogelio Cano's sister was a migrant worker. The record does establish, however, that Gloria Cano, Rogelio Cano's sister, did keep the payroll records. (Tr. 142-143) As the Department of Labor has failed to establish that Rogelio Cano's sister was a migrant worker, I find that the failure to list her work hours on the payroll records is not a violation of the Act. It is clear that each of the migrant workers found to be illegal aliens by INS were working for Rogelio Cano in August of 1983. The period covered by the one completed payroll record reviewed by the Department of Labor investigators, however, has not been defined. Therefore, it is impossible to determine whether the illegal alien migrant workers should have been listed on that particular payroll record. Additionally, I do not know which illegal alien migrant workers who should have been named on the payroll records were not named therein. Therefore, I find that the Department of Labor has not presented sufficient evidence on

which to base a finding that §201(d)(1) of the Act was violated. Accordingly, I find that Plaintiff has not proven that Rogelio and Juan Cano violated this section of the Act.

Itemized Written Statement of Payroll Information

Section 201(d)(2) of the Act, 29 U.S.C. §1831, and §500.80(d) of the Regulations provide that farm labor contractors must provide to each worker an itemized written statement for each pay period of the information required in §201(d)(2) of the Act and §500.80(a) - (b) of the Regulations. The information required to be provided by each statement was detailed in the previous section of this Decision. It is alleged that this violation occurred during only the 1983 growing year.

The statements of the twelve migrant workers interviewed by the Department of Labor during 1983 concerning whether they received itemized written pay statements are summarized as follows (PX 3)

1. One worker had not yet been paid;

2. One worker had been paid in cash, but did not indicate whether or not a pay statement had been received;

3. Three workers were paid in cash and stated that they had not received pay statements;

4. Two workers stated that they received pay statements, but did not describe the contents of the statements;

5. One worker stated that the pay statement he received indicated only the total amount of money received;

6. Three workers received pay statements, but stated that the hours they worked were not on the statements; and

7. One worker received a pay statement which showed the number of hours; deductions made, and the total pay.

Five of the twelve workers stated that they were paid by Juan Cano and seven did not indicate who had paid them.

Ms. Cazel testified that the deficiency regarding pay statements was either that a statement was not provided or, if a statement was provided, that the hours worked were not listed on the pay statement. (Tr. 123-124)

After careful consideration, I find that although it appears that Rogelio and Juan Cano

may have regularly provided pay statements to their employees at the time they were paid, it is apparent that the majority of those statements did not list the number of hours worked. The Act and Regulations require that the number of hours worked be listed on the pay statements. Therefore, I find that §201(d)(2) of the Act was violated.

The Department of Labor assessed a penalty of $100.00 against Rogelio and Juan Cano jointly on the basis of the failure to provide itemized written statements of payroll violation. One-hundred dollars is recommended by the Department of Labor as the appropriate penalty for a failure to provide wage statements to workers violation. (PX 6) The Department of Labor's penalty recommendation includes the provision that if a violation is other than aggravated, willful, or recurring, the penalty should be reduced by fifty percent. (PX 6) As the record establishes that the payroll statement violation was recurring, i.e., repeated during the 1983 growing year, I find that the penalty assessed by the Department of Labor is reasonable and appropriate.

Knowingly Utilized the Services of Illegal Aliens

Section 106(a) of the Act, 29 U.S.C. §1816, and §500.58 of the Regulations prohibit farm labor contractors from recruiting, hiring, employing, or using, with knowledge, the services of any individual who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment. Section 106(b) of the Act and §500.54 of the Regulations provide that farm labor contractors will be considered in compliance with the prohibition if they demonstrate that they relied in good faith on documentation prescribed in the regulation attesting to a prospective employee's status as a United States citizen or as an individual lawfully authorized to work in the United States and they had no reason to believe that the prospective employee was an illegal alien. The Department of Labor alleged that Rogelio and Juan Cano hired and employed illegal aliens during the 1983 growing year and that Rogelio Cano hired and employed illegal aliens during the 1984 growing year.

Defendants' counsel has correctly pointed out that §106 of the Act was repealed by Congress in the Immigration Reform Control Act of 1986. Pub. L. No. 99-603, 100 Stat. 3372 (1986). Congress provided that the amendments to the Act enacted by the Immigration Reform Control Act shall apply to the employment, recruitment, referral, or utilization of the services of an individual occurring on or after the first day of the seventh month beginning after the date of enactment of the Immigration Reform Control Act. The date of enactment was November 6, 1986. Thus, Congress intended that §106 of the Migrant and Seasonal Agricultural Worker's Protection Act be applied to all recruitment, hiring, employment, and utilization of migrant workers which took place prior to June of 1987. The position of counsel for the Defendants that §106 of the Act has been repealed and, therefore, is now unenforceable is incorrect.

Under the Farm Labor Contractor Registration Act of 1963, as amended (hereinafter referred to as FLCRA), it is clear that if a farm labor contractor recruited, employed, or utilized with knowledge the services of an illegal alien and failed to produce an affirmative showing of a bona fide inquiry into each prospective employee's citizenship or right to work status, they would be found to have violated the Act. See 29 C.F.R. 40.51(p) (1980); Counterman v. United States

Department of Labor, 103 Lab. Cas. ¶34,725 5th Cir. 1985) . In fact, farm labor contractors had an affirmative duty under the FLCRA to inquire into the citizenship or right to work status of prospective employees. Id. The FLCRA was repealed by the Migrant and Seasonal Agricultural Worker's Protection Act. Section 106 of the Act does not place an affirmative duty on farm labor contractors to demonstrate that they relied in good faith on documentation of citizenship or the right to work status of prospective employees. Instead, the Act and its Regulations provide that a prima facie case is established against farm labor contractors if it is shown that they recruited, hired, employed, or used, with knowledge, the services of an illegal alien and that farm labor contractors may overcome the prima facie case with a showing of good faith reliance on documentary proof that the worker is rightfully working in the United States. Consequently, in order to avoid a violation of the Act, farm labor contractors do not have the initial burden of establishing that they relied on documentation in determining whether their employees are rightfully working in the United States.

The knowledge requirement is met if the Plaintiff establishes that the Defendants had either actual or constructive knowledge that they had recruited, hired, employed, or utilized the services of illegal aliens. Constructive knowledge is that knowledge which one would or should have known through the exercise of reasonable care. One is deemed to have knowledge of those facts which a reasonable and ordinary person in a like situation would have known. A Record of Deportable Alien form completed by an INS official is sufficient to establish a prima facie case of deportability. Cabral-Avilav v. Immigration and Naturalization Service, 589 F.2d 957 (9th Cir. 1968); cert. denied, 440 U.S. 920 (1979). Once a Record of Deportable Alien form s received into evidence, the burden shifts to the party opposing that determination to prove that the person is not a deportable alien. Id.

1983 Growing Year - Rogelio and Juan Cano

Alfonso Barron-Colchaio, Vasilio Borjas-Barron, Melecio Maldonado-Duque, Jaime Lunga-Maldona, Juan Zuniga-Vega, and Guillermo Sanella-Ortega were each determined by INS on September 7, 1983, to be deportable illegal aliens. (Tr. 25; PX 1) Defendants have produced no evidence to show that these persons were not deportable aliens. Each of these persons returned to Mexico. (Tr. 25) Each also informed the INS investigators that he was employed by Juan Cano in Ansonia, Ohio. (PX 9) The statements which these persons gave to the Department of Labor investigators confirm that they were employed by Juan or Rogelio Cano. (PX 3) Therefore, I find that Juan and Rogelio Cano did recruit, hire, employ, or utilize the services of illegal aliens during the 1983 growing year. The crux of the issue is whether they did so with knowledge.

The twelve migrant workers interviewed by the Department of Labor investigators provided the following reliable information concerning whether Juan and Rogelio Cano knew of their citizenship or right to work status (PX 6):

1. Leonardo Zuniga Alanis and Saul Martinez Zuniga each stated that Juan did not ask him if he was a citizen or if he had a Social Security Number.

2. Alfonso Barron and Melecio Maldonado Duque each stated that Juan did not ask him if he was a citizen, if he had a Social Security Number, or if he had working papers.

3. Basilio Borjas stated that Juan did not ask him if he had a Social Security Number, if he had working papers, or if he was a citizen and that he did not tell Juan that he was not a citizen.

4. The statement of Jaime Zuniga Maldona is that Juan did not ask him if he was a citizen but that he told Juan that he was not a citizen.

5. Filomeno Martinez stated that he is a U.S. citizen with papers, that he spoke with the farmer, and that the crew leader had his Social Security Number.

6. Manuela Molina stated that Roy knew him previously and knew that he was a citizen.

7. Jose Orlando Reyes stated that Juan asked him if he was a citizen.

8. The statement of Nabal Guzman Solis is that he is a citizen and that Roy Cano did not check his papers.

9. Juan Zuniga stated that he has green working papers and that Roy asked him if he could work in the United States. In a second statement taken approximately two weeks later, he stated that he told Juan that he has a Social Security Number.

10. Guillermo Zanella stated that he was not asked by Juan Cano if he was a citizen.

I find that the migrant worker statements do not establish that Rogelio or Juan Cano had actual knowledge that any migrant worker he recruited, hired, or employed was an illegal alien. Although Jaime Zuniga Maldona stated that he told Juan he was not a citizen, there is no evidence establishing that Juan Cano also had actual knowledge that Jaime Zuniga Maldona was not authorized by. the Attorney General to accept employment. I do find, however, that Juan Cano should have known that Jaime Zuniga Maldona was an illegal alien, and that therefore, he had constructive knowledge that Jaime Zuniga Maldona was an illegal alien. A reasonable and prudent person hiring, recruiting, and employing agricultural workers who is voluntarily told by a prospective employee that he is not a citizen should be put on notice that the prospective employee might be an illegal alien and should question the prospective employee concerning his status in the United States. Therefore, I find that Juan Cano and Rogelio Cano, as Juan Cano's employer, did, with knowledge, recruit, hire, employ, or utilize the services of one illegal alien. The next question to be discussed is whether Juan and Rogelio Cano should have known that the

five other migrant workers who were found to be illegal aliens by INS were in fact illegal aliens.

The record contains no evidence concerning the prevalence of illegal alien migrant workers in the State of Ohio. Thus, it cannot be concluded that the number of illegal alien migrant workers in the State of Ohio is so high that Defendants should have, as a matter of course, inquired whether their prospective employees were illegal aliens. The record does, however, contain evidence which indicates that during the 1983 growing year Juan Cano should have known that illegal aliens do seek migrant labor work in the State of Ohio, and that therefore, he should have asked prospective employees whether they were legally seeking work in the United States.

On June 3, 1981, the Department of Labor filed a Complaint against Juan Cano in the United States District Court for the Southern District of Ohio. (PX 7) One of the counts in that Complaint alleged that Juan Cano had recruited, employed, or utilized, with knowledge, the services of persons who were aliens not lawfully admitted into the United States for permanent residence. It was alleged that his actions took place while working for Paul Knick in and around Greenville, Ohio. On June 3, 1981, a United States Marshal filed a statement that he had legal evidence of service of the Summons and Complaint on Juan Cano. (DPHX 1) On February 19, 1982, the Honorable Walter H. Rice entered a default judgment against Juan Cano ordering that he be permanently enjoined from violating various sections of the Farm Labor Contractor Registration Act of 1963, including the section which concerned recruiting and employing illegal aliens. (DPHX 1) On January 5, 1981, an assessment of civil money penalty was issued against Juan Cano by the Wage and Hour Division, U.S. Department of Labor, concerning Juan Cano's operations in the State of Ohio from August 15, 1980 until September 19, 1980. (PX 11) The assessment included a $400.00 penalty for knowingly employing workers who were aliens not lawfully admitted for permanent residence or who were not authorized by the Attorney General to accept employment. There is no indication in the record that Juan Cano requested a formal hearing concerning that assessment. Although the matter was not finally resolved until February 2, 1984, on which date Juan Cano acknowledged that the assessment had become a final Order of the Secretary, the issuance of the assessment which included a violation concerning illegal aliens, supports the conclusion that during the 1983 growing year Juan Cano should have known that some of his prospective employees or recruits were likely to be illegal aliens.

After careful consideration, I find that it has been established that Juan Cano had reason to believe that some of the prospective migrant workers he recruited, hired, or employed in the State of Ohio during the 1983 growing season were likely to be illegal aliens. Therefore, I find that his failure to inquire into their status in the United States establishes that he had constructive knowledge of the illegal alien status of the six migrant workers he recruited, hired, and employed who were determined to be illegal aliens by INS. As his employer, Rogelio Cano is also responsible for Juan Cano's violation of the Act. Defendants have submitted no evidence that they, in good faith, relied upon documentation, as set forth in §500.59 of the Regulations, indicating that the illegal aliens were rightfully working in the United States. Thus, the prima facie case established by Plaintiff has, not been rebutted.

The Department of Labor assessed a penalty of $8,000.00 against Rogelio and Juan Cano jointly on the basis of the illegal aliens violation of the Act. It was alleged that Defendants recruited, hired, employed, and utilized, with knowledge, the services of eight illegal aliens. I find, however, that it has been demonstrated that Defendants recruited, hired, and employed, with knowledge, only six illegal aliens. There is no evidence in the record that two additional migrant workers were actually determined to be working illegally in the United States. Four-hundred dollars per illegal alien is recommended by the Department of Labor as the appropriate penalty for an engaging illegal aliens violation. (PX 6) It is also provided that the total penalty may exceed $1,000.00 and that the penalty may be reduced by fifty percent if the violation is other than willful, recurring, or aggravated. Section 503(a)(1) of the Act states that a civil money penalty of not more than $1,000.00 may be assessed for each violation. Section 500.143 of the Regulations provides that in determining the amount of penalty to be assessed for any violation of the Act, the type of violation committed and other relevant factors, including but not limited to the following should be considered:

1. Previous history of violations of the Act or the FLCRA;

2. The number of workers affected by the violations;

3. The gravity of the violations;

4. Efforts made in good faith to comply with the Act;

5. Explanation of person charged with the violations;

6. Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the Act; and

7. The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

Defendants' actions are found to have been undertaken with knowledge and, therefore, were willful. Juan Cano has a history of violating the FLRCA. On March 3, 1983, a civil money penalty was assessed against Rogelio Cano on the basis of violations of the FLRCA, however, consent findings in that matter were not entered until November 14, 1984. (PX 8) Six workers were affected by the violation, but it was not established how many workers Defendants employed, thus, it cannot be determined whether the majority of workers were affected by the violation. Rogelio Cano has indicated that he is committed to compliance with the Act. There is no evidence in the record concerning Defendants' efforts to comply, their explanation of the violation, or any financial gain they achieved.

After careful consideration, I find that the Department of Labor recommended penalty of $400.00 per alien is an appropriate and reasonable penalty in this case. Accordingly, I find that the

appropriate penalty to be assessed jointly against Rogelio and Juan Cano on the basis of the illegal aliens violation is $2,400.00.

1984 Growing Year - Rogelio Cano

Everardo Guzman-Alcana, Ricardo Barrios-Lopez, Gabriela Godinez-De Barrios, Jasmin Barrios-Godinez, who was less than one year old and not a migrant worker, Javier Flores-Nino, Sexto Guerrero-Custillo, Alfredo Vasquez-Pintor, and Efran Ventura-Silva were found in September and October of 1984 to be deportable aliens by INS investigators. (PX 2) Defendants have produced no evidence that these persons were not deportable aliens. Three of the illegal aliens named Knick Farms as their employer, one named Cano, and three named Rogelio Cano as their employer in their statements to the INS investigators. (PX 2) Each of the migrant workers determined to be illegal aliens by INS also provided statements to the U.S. Department of Labor investigators. (PX 4) Except for the statement of Javier Flores-Nino, each indicates that the illegal aliens were hired or employed by Roy Cano. Javier Flores-Nino stated that he was recruited, hired, and paid by Juan Cano. There is no indication in the record that Juan Cano was an employee of Rogelio Cano during the 1984 growing year.

The reliable and relevant statements of the migrant workers interviewed during the 1984 growing year by the U.S. Department of Labor investigators are as follows:

1. Sr. Everado Guzman-Alcanta stated that Rogelio Cano did not ask him if he was a U.S. citizen and that he gave Mr. Cano his wife's Social Security Number; his wife was also employed as a migrant worker.

2. The statement of Josie Dominquez and Manuel Savale is that Roy asked to see their working papers.

3. Domingo Garcia Peses stated that Roy Cano checked to see if he could work in the United States.

4. Esperaza Perez stated that Roy Cano checked his Social Security card and other identifications for citizenship.

5. The statement of Saul Torres and Blanca Torres is that Rogelio asked for their Social Security Number and "permit."

The record does contain evidence that Rogelio Cano was notified that some of the migrant workers he had hired during the 1983 growing year were illegal aliens. Although it had not at that time been finally determined whether he had violated the Act by knowingly hiring illegal aliens in 1983, the assessment concerning the 1983 growing year placed Rogelio Cano on notice in 1984 that illegal alien migrant workers do seek work in the State of Ohio. Therefore, he should have known of the need to request documentation from the migrant workers he hired in 1984 concerning their right to work. On that basis, I find that Rogelio Cano had constructive

knowledge that the migrant workers he recruited, hired, and employed who were determined by INS to be illegal aliens were indeed illegal aliens. Although it is apparent that he asked the migrant workers he hired about their status, Defendant submitted no evidence that he relied upon documentation, as set forth in §500.59 of the Regulations, indicating that the illegal aliens were rightfully working in the United States. Thus, the prima facie case established by Plaintiff has not been rebutted.

The Department of Labor assessed a penalty of $7,000.00 against Rogelio Cano on the basis of the illegal aliens violation of the Act. It was alleged that he recruited, hired, employed, and utilized, with knowledge, the services of seven illegal aliens. The statements of six of the illegal aliens establish that they were recruited, hired, or employed by Rogelio Cano. The statement of Javier Flores-Nino, however, establishes only contact with Juan Cano. As there is no evidence that Juan Cano was employed by Rogelio Cano during the 1984 growing year, I find that the record does not establish that Rogelio Cano is responsible for any violation of the Act concerning Javier Flores-Nino. Consequently, I find that Rogelio Cano violated the Act by hiring, recruiting, or employing, with knowledge, six illegal aliens. The recommended penalty for an engaging illegal aliens violation and the factors to be considered in determining whether an assessed penalty is appropriate and reasonable were detailed in the previous section of this Decision concerning the 1983 growing year engaging illegal aliens violation.

It has been found that Defendants' actions were undertaken with knowledge and, therefore, were willful. On March 3, 1983, a civil money penalty was assessed against Rogelio Cano on the basis of violations of the FLRCA, however, consent findings in that matter were not entered until November 14, 1984. (PX 8) A civil money penalty was assessed against Rogelio Cano on July 5, 1984, for violations of the MSPA, however, findings in that matter are made in this Decision. Six workers were affected by the violation, but the total number of workers Defendant employed was not established, thus, it cannot be determined whether the majority of workers were affected by the violation. Rogelio Cano has indicated that he is committed to compliance with the Act. The record establishes that during the 1984 growing year, Defendant made some effort to comply with the Act in that he consistently asked migrant workers about their status in the United States. Although he did not go so far as to provide documentation which he relied upon, it is apparent, when compared with the actions undertaken during the 1983 growing year, that Defendant improved his actions in regard to compliance with the Act during the 1984 growing year. There is no evidence in the record concerning Defendants' explanation of the violation or any financial gain he achieved.

After careful consideration, I find that the Department of Labor's recommended penalty of $400.00 per alien is an appropriate and reasonable penalty in this case. Accordingly, I find that the appropriate penalty to be assessed against Rogelio Cano on the basis of the illegal alien's violation is $2,400.00.

Juan Cano's Failure to Register as a Farm Labor Contractor

Section 101 (a) of the Act, 29 U.S.C. §1811, and §500.40 of the Regulations provide that any person, including the employee of a registered farm labor contractor, desiring to engage in farm labor contractor activities, unless exempt, must obtain a Certificate of Registration. An employee of a registered contractor may obtain a Farm Labor Contractor Employee Certificate of Registration. The Department of Labor has alleged that during the 1983 growing season Juan Cano performed farm labor contractor activities, as an employee of Rogelio Cano, without an appropriate Certificate of Registration.

"Farm labor contracting activity" is defined as recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker. Section 500.20(i). Nine of the twelve migrant workers interviewed by the Department of Labor in 1983 commented on Juan Cano's activities regarding their employment. (PX 4) Leonardo Zuniga Alanis stated that he came to Ohio with a friend and that when he arrived he spoke with Juan Cano about work and that Juan Cano paid him. Alfonso Borron stated that he was "recruited" by Juan Cano and that he rode to Ohio on a green bus. Basilio Borjas told the Department of Labor investigators that he hitchhiked to Ohio from Mexico and that someone suggested he go to Juan Cano for work. He also stated that Juan Cano did not ask him for his Social Security Number or if he was a citizen, thus, indicating that Juan Cano hired him. Melecio Maldonado Duque stated that he "worked for" and was paid by Juan Cano. He, too, stated that Juan Cano did not ask him for a Social Security Number or if he was in the United States legally, thus, indicating that he was hired by Juan Cano. Jaime Zuniga Maldona told the Department of Labor investigators that Juan Cano was the boss, that he "talked to Juan about working here", and that Juan paid him. Jose Orlando Reyes stated that he came from Florida to Ohio in a truck which had Juan Cano written on it, that Juan told him about the employment conditions while they were in Florida, and that Juan paid and talked with the workers. Juan Zuniga Vega stated that he had worked with Juan Cano for one year and that he told Juan that he has a Social Security Number. Guillermo Zanella told the investigators that he learned about the Ohio job from Juan Cano and that he came to Ohio in a bus which was furnished, but not driven, by Juan Cano. Finally, Saul Martinez Zuniga stated that Juan Cano told him about the work, that Juan did not ask for his Social Security Number or if he was a citizen, and that he was paid by Juan.

The six migrant workers who were determined to be illegal aliens informed the INS investigators that their employer was Juan Cano. (PX 1)

I find that the migrant worker statements which are a part of the record establish that during the 1983 growing season Juan Cano engaged in farm labor contracting activities which included recruiting, hiring, and furnishing migrant agricultural workers. As discussed in relation to

the disclosure violation, Ms. Cazel testified that Rogelio Cano's 1983 payroll records establish that Juan Cano was an employee of Rogelio Cano. (Tr. 119, 216) Ms. Cazel also testified that the Department of Labor's central registry did not list Juan Cano as a registered farm labor contractor or a registered farm labor contractor employee in 1983. (Tr. 119-120, 210-216) The record also indicates that Juan Cano was issued a Certificate of Registration on January 31, 1984, after the above-described activities had taken place. (Tr. 213-215)

After careful consideration, I find that the record sufficiently establishes that Juan Cano was engaged in farm labor contractor activities during the 1983 growing year as an employee of Rogelio Cano and that Juan Cano was not registered as a farm labor contractor or a farm labor contractor employee during the relevant time period. Thus, I find that Juan Cano did violate §101(a) of the Act.

The Department of Labor assessed a penalty of $1,000.00 against Juan Cano for failing to register as a farm labor contractor or a farm labor contractor employee. One-thousand dollars is recommended by the Department of Labor as the appropriate penalty for failure to register as a farm labor contractor and $300.00 is the recommended penalty for failure to register as a farm labor contractor employee. (PX 6) It is provided that both penalties may be reduced by fifty percent if an application for a Certificate of Registration is filed prior to the beginning of the investigation or if the violation is other than aggravated, willful, or recurring. There is no indication in the record that Juan Cano applied for a Certificate of Registration before the investigation began.

It has been established that during the 1983 growing year Rogelio Cano was a registered farm labor contractor and that Juan Cano was his employee. Thus, I find that the penalty for failure to register as a farm lator contractor is not the appropriate penalty in this case and that instead, the penalty for failure to register as a farm labor contractor employee should be applied. Although the migrant worker statements include assertions that Juan Cano was the contractor (PX 4), I find that these statements are not reliable because the migrant workers had no reason to know of the employer-employee relationship between Rogelio Cano and Juan Cano. There is no reason to believe that the migrant workers had personal knowledge of the employment status of Juan Cano.

The record does contain evidence that Juan Cano's failure to register prior to engaging in farm labor contractor activities is a recurring problem. On June 3, 1981, the Department of Labor filed a Complaint against Juan Cano in the United States District Court for the Southern District of Ohio. (PX 7) One of the counts in that Complaint alleged that Juan Cano engaged in farm labor contractor activities without first obtaining a Certificate of Registration. On June 3, 1984, a United States Marshal filed a statement that he had legal evidence of service of the Summons and Complaint on Juan Cano. On February 19, 1982, the Honorable Walter H. Rice entered a default judgment against Juan Cano ordering that he be permanently enjoined from violating various sections of the Farm Labor Contractor Registration Act of 1963. The judgment included the order that Juan Cano be restrained from violating the Certificate of Registration provisions of that Act. (PX 7) Therefore, I find that the appropriate penalty against Juan Cano for failure to register is

$300.00.

Rogelio Cano's Employment of an Unregistered Farm Labor Contractor Employee

Section 101(b) of the Act, 29 U. S. C. §1811, and §500.41 of the Regulations provide that farm labor contractors are responsible for assuring that every employee performing farm labor contractor activities on their behalf has obtained either a Farm Labor Contractor Employee Certificate of Registration or a Certificate of Registration as an independent farm labor contractor. The Department of Labor alleged that during the 1983 growing year Rogelio Cano utilized an employee, Juan Cano, in farm labor contracting activities and that Juan Cano was not a registered farm labor contractor or farm labor contractor employee while he performed these activities.

As discussed in the previous section of this Decision concerning whether Juan Cano failed to register as a farm labor contractor, the record establishes that during the 1983 growing year Juan Cano was employed by Rogelio Cano, and Juan Cano performed farm labor contracting activities for Rogelio Cano. He was not registered as a farm labor contractor or a farm labor contractor employee. As the Act and Regulations make farm labor contractors responsible for ensuring that their employees obtain a proper Certificate of Registration, I find that Rogelio Cano violated §101(b) of the Act. Additionally, Rogelio Cano ratified Juan Cano's farm labor contractor activities by employing the migrant workers recruited by Juan Cano.

The Department of Labor assessed a penalty of $1,000.00 . against Rogelio Cano on the basis of his employment of an unregistered farm labor contractor employee who performed farm labor contracting activities. One-thousand dollars is recommended as the appropriate penalty. The penalty may be reduced by fifty percent if the violation is other than aggravated, willful, or recurring or if application for a Certificate of Registration was made prior to the beginning of the investigation. There is no indication in the record that Juan Cano applied for a Certificate of Registration before the investigation began. Although the record does demonstrate that Rogelio Cano was aware of this requirement of the Act prior to the time he violated the Act (PX 8), there is no evidence that this is a recurring, willful, or aggravated violation. Rogelio Cano did not admit to violating the Act and it has not previously been determined after a formal hearing that he violated the Act. The Consent Findings entered by Rogelio Cano on November 14, 1984, specifically state that he neither admitted nor denied the alleged violations of the Act. Therefore, I find that the recommended $1,000.00 penalty assessed against Rogelio Cano should be reduced by fifty percent. Additionally, Rogelio Cano agreed to future compliance with the Act and apparently complied with this provision of the Act in the 1984 growing year. I find that the appropriate and reasonable penalty against Rogelio Cano for this violation is $500.00.

Failure to Provide Payroll Records to Employer - Farmer

Section 201 (e) of the Act, 29 U.S.C. §1821, and §500.78(c) of the Regulations require farm labor contractors to provide copies of their payroll records to the agricultural employer to whom the migrant workers are furnished. The Department of Labor alleged that Rogelio Cano

failed to provide his 1983 payroll records to Paul Knick and the violation was included in the assessment against Rogelio Cano which generally concerned the 1984 growing year.

Ms. Cazel testified that during the 1984 investigation she asked either Mr. or Mrs. Knick whether they had Rogelio Cano's 1983 payroll records. (Tr. 142, 200-201) The Knicks replied that they did not have the records. (Tr. 142-143, 201) Rogelio Cano stated that he did not have the records and suggested that his sister, Gloria, be contacted. (Tr. 143) Ms. Cazel testified that she asked Gloria Cano for the payroll records and that Gloria said that she did not have the records and that they had "left in such a hurry, they had not had time to submit them to the Knicks." (Tr. 143, 203) I find that this is sufficient to establish that Rogelio Cano violated the Act by failing to submit his 1983 payroll records to the agricultural employer to whom he furnished the migrant workers.

The Department of Labor assessed a penalty of $50.00 against Rogelio Cano on the basis of the failure to provide payroll records violation. One-hundred dollars is recommended as the appropriate penalty. As the violation was neither aggravated, willful, nor recurring, I find that it was appropriate to reduce the penalty by fifty percent. Therefor, the $50.00 penalty assessed against Rogelio Cano for the failure to provide records violation is reasonable.

Revocation of Rogelio Cano's Certificate of Registration

Section 103(a)(3) of the Act, 29 U.S.C. §1813, and §500.51(c) of the Regulations provide that the Secretary of Labor may suspend or revoke a Certificate of Registration if the holder has failed to comply with the Act or any regulation under the Act. It has been established in this Decision that Rogelio Cano failed to comply with numerous provisions of the Act and its Regulations. Therefore, I find that Plaintiff's revocation of Rogelio Cano's Certificate of Registration was proper. It is noted that the Certificate of Registration expired on September 30, 1985. (PX 5)

ORDER

IT IS ORDERED, therefore, that the Defendants, Rogelio Cano and Juan Cano, shall pay immediately to the Wage and Hour Division, U. S. Department of Labor, civil money penalties, pursuant to 29 C.F.R. §500.144, as follows:

1. A penalty of $2,600.00 assessed jointly and severally against Rogelio and Juan Cano for violations of the Act which occurred during the 1983 growing year.
2. A penalty of $500.00 assessed against Rogelio Cano for a violation of the Act which occurred during the 1983 growing year.

3. A penalty of $300.00 assessed against Juan Cano for a violation of the Act which occurred during the 1983 growing year.

4. A penalty of $2,550.00 assessed against Rogelio Cano for violations of the Act which occurred during the 1984 growing year.

RUDOLF L. JANSEN
Administrative Law Judge